

The Puno ConCom Constitution, Democracy and Media
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By Christian S. Monsod

The last time you invited me was before the 2016 elections, which marked the rise of President Rodrigo Roa Duterte.

Today you ask me to talk about the Puno ConCom constitution – what it means to democracy and to press freedom. I believe that the ConCom proposal , which is not just a shift to federalism but involves a sweeping overhaul of our Constitution is objectionable both in its context and content.

First the context.

An article written by Takis S. Pappas in the Journal of Democracy, Volume 30, April 2019, entitled Populists in Power, based on studies of seven countries¹ says that populism typically displays four interrelated characteristics:

- (1) reliance on extraordinary charismatic leadership – which is hard to counter with logical arguments and coherent policy proposals;**
- (2) the ceaseless, strategic pursuit of political polarization;**
- (3) a drive to seize control of the state, emasculate liberal institutions, and impose an illiberal constitution, directed at media, the judiciary, the educational system and civil society organizations, and I might add, in our case the Church;**
- (4) the systematic use of patronage to reward supporters and crowd out the opposition.**

¹ Argentina (1946), Greece (1981), Peru (1990), Italy (1994), Venezuela (1998)
Ecuador (2007), Hungary (2010)

The article concludes that populist rule leads to liberalism's decay and sometimes even to democratic breakdown and refutes beyond any doubt the empirically groundless idea that ruling populism may be a "corrective" to the shortcomings of democracy. And it warns that once populists enter office, they tend to display exceptionally strong electoral resilience. (Like the recent May 2019 elections?)

The book "How Democracies Die" (Levitsky and Ziblat, 2018) tells us that, since the Cold War, authoritarianism has been assumed not by military coup d'etats but by elected leaders through constitutional revisions. And any of four signs means that an elected leader wants to become a dictator:

- (1) rejects in words or actions the democratic rules of the game, both in written constitutions or unwritten norms of conduct and civility in a functioning democracy;
- (2) denies the legitimacy of opponents;
- (3) tolerates or encourages violence;
- (4) indicates a willingness to curtail the civil liberties of opponents.

The questions beg to be asked: Is this happening in the Philippines today? Are we already on a slippery slope to constitutional authoritarianism and, if so, what can we do about it. Is the shift to federalism a part of the problem or of the solution.

For a start, according to the studies of Prof. Gene Lacza Pilapil of the U.P Political Science Department, there are many institutional design literature insights or warnings against a shift to federalism, but I will only mention four.²

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- (1) Countries with functioning democratic systems, however imperfect, should consider reform and refinements,, and only of manifest errors, rather than

² Such as: (1) Prof. Rosario Manasan's talk on Federalism and Fiscal Issues at the Galing Pook Forum on Nov. 11, 2016; (2) Prof. Gene Lacza Petilla's 15th Jaime V. Ongpin Lecture on Federalism which cites many international studies and sources; (3) Rethinking Federalism – Citizens, Markets and Governments in a Changing World, Edited by Karen Knop et al, which contains many articles by experts on developments on Federalism up to 1995.

an overhaul because there is no consensus on the superiority of a federal to a unitary form or vice-versa. So why shift?

- (2) A messed-up “structural overhaul” is virtually irreversible and could lead to an unstable democracy, or even its ruin. The ConCom constitution provides that the federal form can never be changed;**
- (3) A pre-condition for a successful shift to federalism is a fully functioning political party system. That we do not have.**
- (4) Federalism tends to serve the interest of, and thus further entrenches, the existing dominant groups in the regions- in our case - political dynasties, warlords and the landed elite who will likely find the regional powers and resources of federalism to their liking.**

WHERE ARE WE NOW?

I believe that we are already on a slippery slope to authoritarianism. And a new charter that would constitutionalize it would be a betrayal of a people who brought us out of the darkness of a dictatorship.

We have a president who governs through the use of fear and force and in only three years has weakened or coopted the constitutional “checking powers” of the Congress, especially the House, and of the Supreme Court with its questionable rulings on the detention of Sen. de Lima, the quo warranto removal of Chief Justice Sereno , and the three extensions of martial law, such that today martial law can be declared anytime, anywhere in the country.

There are of course other “checking powers” than government institutions. There is media, a part of it already engaged in self-censorship, civil society and the integrated bar of the Philippines, which is doing a yeoman’s job of defending peoples’ rights against state abuse.. But has been silent for a while. But the guardrails of

democracy are thinning. There is even the purposive attack against the Church to weaken the potential of its intervention.

The issue with President Duterte is not “language games” or mental illness but dangerousness with power. Which I will touch on later in relation to certain provisions of the ConCom proposal, especially its Transitory Provisions

Of course, the ConCom draft is only recommendatory. The final version will come from the ConAss, if it materializes, and will likely be worse, because it will reflect the balance of power of vested interests in the Congress, where we have a growing problem of political dynasties.³ In fact, we are being asked to approve a change in the structure first and to trust them to enact the transition plans and the reform legislation afterwards.

How can we trust the outcome when we cannot trust the process?

Today we are facing the sixth attempt to revise the Constitution.⁴ All five previous attempts did not prosper because the people perceived the articulated purposes as a smokescreen for personal agendas, even in the case of the well-meaning because, in changing the fundamental law, sincerity is not a substitute for correctness.

Question: If federalism is the answer, what is the question? Because federalism, unitary, parliamentary, presidential, even martial law or quo warranto are just means to an end. It is the ends that drive the means and not the other way around. And if we agree on the ends we can achieve anything.

³ According to an Ateneo Study on political dynasties 78% of our Congressmen or almost 4 out of every five of our Congressmen belong to political families/dynasties; and, among our local leaders, **81% of our Governors** and **69% of our Mayors** belong to political dynasties. **Some 94% of our provinces (73 out of 81) have political dynasties who number some 178 in the country.** The World Bank estimate based on a PCIJ study is 200.

⁴ Ramos Pirma, Estrada Concord, Arroyo Sigaw ng Bayan., Arroyo Joint Vote, Joint Resolution on inserting “unless otherwise provided by law” in six provisions.

I submit that the question is: how can we best fulfill the promise of a new social order that serves the interests of the poor, who are supposed to be the center of our development?

Why that question? Because we are the laggards on mass poverty and gross inequalities in our part of the world. Because the biggest divide in our country is not culture or identity or territory but the divide between the rich and the poor. And because, EDSA, was not only about the restoration of democracy but the promise of a new social order with radical changes in a feudalistic society that has been impervious to change for generations and the corruption that goes with it.

This promise has not been fulfilled for 32 years and we have an accountability to the poor, especially those of us who had our turn in government, And I submit that federalism is not the right means to that end.

Late last year, Fabella and Daway-Ducane from the UP School of Economics, released an empirical study of 105 economies from 1987-2016, that, they say, does not support the notion that federalism is good for reducing poverty and inequality. It is still a discussion paper and I'm sure we will be hearing more about it.⁵

"The pro-Federalism position claims that Federalism will cause poverty to fall and the distribution of income to be more equal. Our regression results bear neither of these claims. On the contrary, Federalism strongly predicts higher poverty incidence and severity on average; it does not reduce poverty incidence and severity in developing economies.

".... if inclusion is the criterion, our research results show that poverty incidence and income inequality could become worse."

There is another draft empirical study updated in 2007 from

Boston University⁶ that undertook cross-national empirical tests over several decades of the impact of unitary systems on fifteen indicators of political, economic and human development and concludes:

"In most cases, a strong empirical relationship between unitarism and good governance obtains. To the extent that these constitutional structures make a difference, unitary systems appear to hold distinct advantages over federal ones."

As far as I know, these two are the only empirical studies on the issue.

The reality is that every government is a hybrid that reflects its history, socio-economic and cultural characteristics.

But for the record, because federalism advocates always give as examples of successful federalisms - the United States, Canada, Germany. Belgium, but do not mention that in our part of the world, the Asian tigers are all unitary - Japan, Korea, China and Taiwan. Nor is Indonesia mentioned which overtook us on development about 5 years ago is unitary. Nor that Malaysia is federal but has a more centralized system than ours. Nor that there are about 27 federal forms and about 164 unitary forms.

NEDA and the Dept. of Finance are correct -- Federalism is a risky, intricate political experiment that is vulnerable to unintended consequences. Maybe that is why federalism is not mentioned at all in the Philippine Development Plan 2017-2022 and in Ambisyon 2040 launched by President Duterte in October 2016 to achieve some 300 targets.

NEDA's road map, which the ConCom did not provide, includes a solution to the President's concern about "Imperial Manila" and the underdevelopment of outlying areas - NSS (National Spatial Strategy) - The NSS aims to decongest the NCR and direct growth in key centers throughout the country..."to redress spatial and

⁶ Gerring, Thacker, Moreno (2004), Boston University, "Are Federal Systems Better than Unitary Systems?"

socioeconomic inequalities by linking lagging regions with leading ones, rather than a uniform dispersal of development, which can create diseconomies and inefficiencies." The NSS forms a network of settlements even across political boundaries to maximize the benefits of what economists describe as economics of agglomeration.

As the Philippine Human Development Report 2012-2013 aptly states:

“....Human development is about the welfare of people, not the development of places. The nature of economic development is uneven. It is not about bringing jobs to people but about closing the distance between the people and the jobs by **giving people the capability and mobility to choose where to go.**

Thus, NEDA suggests a road map with “spatial” analysis of the regions, review of the present Constitution, mapping of relevant existing laws, pilot-testing, and reform legislation, especially amendments to the Local Government Code and the Administrative Code. Only then, whether after 10, 12 or 15 years, should we consider the ratification of a federal constitution. More about this NEDA approach later.

If that roadmap effectively addresses the problem of “Imperial Manila” with federalization, how much do we save? The estimates vary: the latest report I read from the Consultative Commission is P20b, Prof. Manasan = P80+ P35b for the initial regional government infrastructure.

The latest NEDA estimate (March 2019) is P116b to P479b and a budget deficit from 3.2% to 4.8% of GDP. Secondly, the funding is not commensurate to function. With a 50% revenue share for federal regions, the National Government expenditures require a sharing for the NG of 65%-35% or 59% to 41%.

Moreover, the NEDA says that the ConCom version “does not seem to be responsive to the clamor for local autonomy as it does not even have specific provisions on LGUs”.

Again the NEDA is correct. Under the ConCom version, our unitary state of 18 regions (incl. Cordilleras) is first broken up and then put together again as “federated regions” with the difference of a new layer of regional government with Executive, Legislative and Judicial departments and its own bureaucracy that will be given all the powers and all the revenues now assigned to LGUs.

All the provisions in the present Constitution applicable to local government units are deleted. All the 81 provinces, 144 cities, 1490 municipalities and 42,029 barangays are disempowered. They will have to await the regional local government codes that will be enacted either by the Central Government or the Regional legislature. Who will control these legislatures? There are an estimated 200 dynastic clans in the country who will be fighting for supremacy in the 18 regions and their Legislatures.

The solution of the ConCom to the likelihood of dynastic “capture” of regional governments is to install a dictatorship during the transition period . Six months after the approval of a new constitution, the incumbent president (Duterte) shall call for snap elections to elect a Transition President who will head a Transition Commission up to 2022. President Duterte is qualified to run in the snap elections. His dilemma is that he needs the political dynasties to implement federalism at the same time that he is supposed to dismantle them. More important, with a constitution tailored to him, what happens to the country when he dies. Other than that, by 2022 he will have to step down anyway and a new president will continue any unfinished changes, presumably with total powers, for as long as it takes.

What more with questionable provisions in the ConCom draft on “surveillance warrants”, which is typically authoritarian – the “target” will be told but that can be done afterwards; “lawless violence” as additional ground for proclaiming martial law, and the power of the President to... take all measures...., against any region who “fails to comply with its obligations” that “seriously undermines the sovereignty, territorial integrity, economy, or unity of the Federal Republic” that provides total discretion (Section 4.

Article XX: General Provisions), and many others⁷, plus the Transitory Provisions with more dictatorial powers than in the Marcos constitution, (a) legislative powers by decree-making to formulate the transition plans of the federal government, every federated region, the independent Commissions, all branches of Government and other component units;

7 Other questionable features of the ConCom constitution.

- (1) the provision of a “surveillance warrant” with advanced technology equipment and its threat to human rights.
- (2) the substitution of “persons” for “human rights” in Article II, Sec. 11 which results in confusion of interpretation;
- (3) the addition of “lawless violence” to proclaim martial law;
- (4) The President can take all necessary actions in the event of a cyberattack. (Section 6, Article XIX: National Security and Public Order) – who determines the magnitude of attacks?
- (5) College degree to run for certain public offices – anti-poor
- (6) No more provision on foreign military bases;
- (7) **No more ban on private armies, armed groups and para-military forces;**
- (8) On the nuanced **shift to business themes and advocacies in the social justice provisions of the Constitution. Two examples.**
 - (a) On agrarian reform. the Federal Land Use policies in Article XV on the Economy dilute the provisions of Article XVI on agrarian reform:
 - Selection...of agrarian reform land is subject to considerations of **contiguity** and **potential** for productivity⁷ - that's almost all the lands
 - “beneficiaries” can be whole families, communities and “similar entities”⁷ (IFAD?)
 - (b) change in the philosophy and policy on the protection of the environment (source: Prof. Gemiliano Bautista, Ateneo)
 - Removal of “measures to prohibit logging in endangered forest and watersheds” (Art XII, Sec. 4) which requires the zoning of conservation-protection forest ares where extractive activities would not be allowed.
 - Replacement provision in Article II, sec. 4 “in recognition of fundamental freedoms, the observance of the rule of law, and the promotion of sustainable human development....”. And motherhood statements in a new Sec.28 of the Bill of Rights.
 - By assuming that existing frameworks and laws for mining are acceptable, the proposed draft brushes aside the need to revise the processes resulting in and emanating from such agreements.⁷

The subtle and insidious changes will gladden the hearts of the mining industry. No more need for a new Mining Law

- (b) executive powers to do all acts to implement the transition plans;**
- (c) judicial powers to settle disputes arising from the transition plans;**
- (d) to organize, re-organize and fully establish the Federal Government and the governments of the Federated Regions;**
- (e) to hire and fire any government official or employee of the government affected by the re-organization (Section 12), which is really all of about 1.3 million of them.**
- (f) determine the fiscal management and administration plan of all the offices (Sec. 8 (b));**
- (g) all powers necessary and proper to ensure a smooth, speedy and successful transition;**

Isn't this a recipe for "packing" the bureaucracy, confusion, political turbulence, economic uncertainty, even violence and the possible ruin of our democracy"

In the Bill of Rights, on freedom of speech, of expression or of the press ... a new sentence is added: "For this purpose, the local government units shall, among other things, establish appropriate freedom parks for the peaceful assembly of the people." I wonder if that will be interpreted in an authoritarian government that people cannot assemble or speak in any other place than the parks?

With regard to the issues of political dynasties and political turncoatism, which are the most popular selling points of the ConCom as a reform constitution. Art. V, Sec. 7⁸ on turncoatism

⁸ SECTION 7. The Federal Republic shall ensure strong and cohesive political parties.

- (a) Members of any political party elected to public office are prohibited from changing political parties within their term of office.
- (b) Candidates and officials of any political party are prohibited from changing political party two (2) years after the election and two (2) years before the next election.

Those who violate the foregoing provisions shall be: (1) removed from the office to which they have been elected; (2) barred from appointment to any government position for one electoral cycle; (3) prohibited from running for public office in the next election; (4) required to return any party funds they used for the campaign. The Federal Commission on Elections shall initiate the appropriate proceedings in the proper court.

does not address the shifting alliances of elected officials, specifically in the House of Representatives. The ban does not cover legislators crossing party lines when legislation involves the interests they represent or their personal advocacies. The ban may even result in candidates running as independents or to create their own small political parties to participate in coalitions with the unintended consequence of an even more fragmented party system than the current one.

On political dynasties, The present constitution gave the Congress the task of defining political dynasties because it assumed that while a 4th degree relationship ban might be needed at first, the ban can be reduced to 2 degrees or might no longer be needed with our political maturity. The Concom version (Art. V, Sec. 8)⁹

(c) No political party shall accept any member in violation of sub-section (a) and (b). Any violation shall be a ground for the cancellation of its registration.

(d) The Federal Commission on Elections shall ensure compliance with these provisions and periodically require political parties to submit an updated list of their members, including any changes arising from violation of the above provisions.

(e) No political party shall nominate more candidates than the number of persons required to be voted for in an elective position, except for the proportional representative seats in the House of Representatives and the Regional Assemblies, nor shall any candidate be allowed to accept nominations from more than one registered political party, except in cases of aggrupation or coalitions.

⁹ SECTION 8. The Federal Republic shall guarantee equal access to opportunities for public service and prohibit political dynasties to prevent the concentration, consolidation, or perpetuation of political power in persons related to one another.

(a) A political dynasty exists when a family whose members are related up to the second degree of consanguinity or affinity, whether such relations are legitimate, illegitimate, half, or full blood, maintains or is capable of maintaining political control by succession or by simultaneously running for or holding elective positions.

(b) No person related to an incumbent elective official within the second civil degree of consanguinity or affinity, as described above, can run for the same position in the immediately following election.

(c) Persons related within the second civil degree of consanguinity or affinity, as described above, are prohibited from running simultaneously for more than one national and one regional or local position. However, in the event that two or more members of the same family are running, the member who shall be allowed to be a candidate shall be determined by the drawing of lots.

(d) The Federal Congress may, by law, provide for additional prohibitions.

prohibition of 2 degrees may not be equal to the problem today and provides for a tossing of the coin to settle disputes which may result in relatives using the provision to harass or blackmail competing relatives. Moreover, the precondition requirement should have been applied to the 2019 elections to see if it works and to test the sincerity of the Congress.

THE 1987 CONSTITUTION

At this point, may I make a few remarks about the 1987 Constitution that the ConCom wants to overhaul \when it already contains the compelling principles and programs to address mass poverty, gross inequalities and the feudalistic system that is at the root of injustice and corruption in our country.

The Constitution has three central themes:: (1) the heart of the Constitution is social justice and human rights; (2) never again to any authoritarianism. It was not only in the violation of human rights, but the economic disaster of 1983 with total powers, or more accurately because of total powers, from which we did not recover until 2002 (20 years later) to the detriment of the poor. (3) the economy should firmly and safely be in Filipino hands. Never again to any foreign domination of our economy with parity rights on our lands and natural resources and amendments to the 1935 Constitution where we could not even change our exchange rate without the approval of the U.S. President.

The 1987 Constitution also innovated by cutting our umbilical cord to that of the United States, which gives primacy to civil and political rights because it is a country of immigrants who all started from the same position and only wanted to be free from autocracy.

Our Constitution gives social and economic rights equal primacy with civil and political rights because we are a country of inequalities from the colonial days to the present where the starting positions of the rich and the poor are not equal.

Social Justice is about the adjustment of these starting positions through income reforms primarily quality education and quality health care, and four asset-reform programs – agrarian reform, urban land reform and housing, ancestral domain, fisheries – to directly help the poorest of the poor. All these programs are underperforming because our Congress either slept on the job for 32 years or protected their self-interest by not enacting the enabling legislation or made sure there are loopholes in the social reform programs or underfunded them.

I submit that we have largely failed in addressing mass poverty and gross inequalities and the underdevelopment of outlying areas and the inequity of our institutions not because of the Constitution but because we have not fully implemented it, especially its social justice provisions and its mandate of local autonomy. The Constitution is not the problem, it is part of the solution.

For lack of time, I will not talk about fiscal decentralization that, according to experts like Prof. Rosario Manasan of U.P. can be done with or without federalization, foreign direct investments and the complexities of the proposed overhaul of the Judicial system.

WHERE ARE WE GOING?

The biggest imponderable to our situation today is the President. What does he really want?

Will he step down by 2022? My bet is yes. He is old, tired and sick. But he wants to avoid or be protected from accountability while in office. The total powers during the transition can ensure the election of his chosen successor.

The second imponderable is the fate of the ConAss. The administration needs 18 senators to pass the revisions. After the May 2019 elections there are only four opposition senators left but there are three re-elected senators who campaigned on a platform that includes a NO vote on the shift to Federalism (Villar, Poe and

Binay). Our work may not be done even if the ConAss is stopped by the present Senate.

But stopping ConAss now is critical because if a new constitution goes to plebiscite, it will be hard to stop it on a simple “yes” or “no” vote. Many people at the ground level, like the farmers and urban poor I work with, still hope the President will be the agent of change they have been waiting for since EDSA. And positive personal experiences on the daily insecurities of ordinary people are more important to them than abstractions and macro-issues – criminality and the “istambays” in the neighborhood, drug related offenses, corruption, delivery of government services, the traffic problem. “Democracy” has not yet been that meaningful in their lives. That is why they were willing to vote for the new faces endorsed by the President. He seems to have read the people better than the opposition. A recent Ateneo analysis of Facebook – 19,000 posts 1.4 comments, of 75million accounts is interesting in this regard.

There is also the changing paradigm of people power - the poor will use it only in their own communities to improve their lives. And will no longer go to the streets and risk their lives for competing elitist leadership.

So trying to bring him down with people power is not a good idea. Neither the idea of impeachment proceedings that may result in an over-reaction that can derail or delay existing initiatives and developments that are pro-poor. And there are quite a number of them.

There are hopeful stirrings at the local level. There is a long list of dynastic names that lost in the last elections. Even if some of them were replaced by other dynasties or whether the reason is contestability rather than dynasty, it still means that there is no need to risk the unintended consequences of charter change with the big bang approach of the ConCom.

As I said in 2016, history has not been kind to our poor and we owe it to them not to make them wait for another president. Or our

longer term vision of a new generation of leaders who come from the poor.

Given all the foregoing, is real social change still possible under the Duterte administration? And if so, what is the role of media in that objective?

My answer is yes by persuading him and working with him on the NEDA approach – i.e. a “spatial” analysis of the regions, an objective review of the present Constitution, a mapping of relevant existing laws and reform legislation especially amendments to the Local Government Code and Administrative Code, learnings from the implementation of the Bangsamoro Organic Law, and other pilot-testing. And a pro-poor agenda on top of the pro-poor laws already passed under his administration, like the long overdue universal health care law.

What about the accountability issue which requires a successor of his choice. Our answer, if he leaves a pro-poor legacy, the people, especially the poor, will be the first to protect him.

Will it work? Yes under the following premises:

(1) I believe that there is a statesman in every politician and it is up to us to find it in every way we can. As long as there is a window of rationality, however small, it is worth the effort to try;

(2) democracy is about dialogue and compromise. There is very little space in the room for extremists or purists. But we all have a right to be heard;

(3) real change can only be achieved with a transformational leader and a transformational people. Any other combination of Transformational and Transactional people or leader has dysfunctional results:

(1) bargaining with power and money (transactional people/transactional leader,

(2) a long march (transactional people/ transformational leader, or

(3) rebellion (transformational people/transactional leader.

Are we willing to ourselves change in the same way that we are asking our leaders to change, even if it is against our self-interest. There is a price to pay for every worthy cause.

The Media has a big role to play in this process – especially in the education campaign (73% of our people admit to knowing nothing or very little about the Constitution, much more on federalism). And in providing the people with the real and not fake news. I can only repeat what I said the last time you invited me, quoting Albert Camus when he received the Nobel Peace Prize for literature which in many ways is similar to your craft:

“Whatever our personal weaknesses may be, the nobility of our craft will always be rooted in two commitments, difficult to maintain, the refusal to lie about what one knows and the resistance to oppression.”....

He also said that,.we must “place ourselves at the service, not of those who make history, but of those who suffer it.

If the President does not want to talk or insists on taking the charter change route, we have a fight in our hands for our rights and our freedoms. And you will have an even greater role in that fight. But we can prevail. We fought five of the last six presidents on matters of principle and won all of them – Marcos on dictatorship, Ramos on Pirma, Estrada on Concord, Arroyo on Sigaw ng Bayan, Aquino on Hacienda Luisita

As a Pulitzer Prize awardee Alice Walker reminds:“the most common way that people lose their power is when they think that they don’t have any.”

Thank you and good day.

